

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

E.I. DU PONT DE NUMBERS AND COMPANY : CIVIL ACTION  
:   
v. :   
:   
THE NEW PRESS, INC., et al. : NO. 97-6267

**MEMORANDUM AND ORDER**

HUTTON, J.

June 25, 1998

Presently before the Court is the Plaintiff's Motion to Extend the Time for Service of Barry Sarenson (Docket No. 22). For the reasons stated below, the plaintiff's motion is **GRANTED**.

**I. BACKGROUND**

Plaintiff, E.I. du Pont de Numbers and Company, Inc. ("DuPont"), alleges the following facts. On August 29, 1994, The New Press, Inc. ("New Press") entered into a lease agreement with Tokai Financial Services, Inc. ("Tokai"), pursuant to which New Press agreed to lease from Tokai various equipment manufactured by DuPont. Pl.'s Compl. ¶¶ 10, 11. In exchange, New Press agreed to pay Tokai \$12,476.00 per month for sixty months. Id. ¶ 11.

The lease provided that "in the event of a default . . . , Tokai may at its option, declare all sums due and immediately payable under the [l]ease." Id. ¶ 17. "In consideration for Tokai's purchase of the . . . [e]quipment for the

benefit of New Press, DuPont verbally agreed to guarantee New Press' payments to Tokai." Id. ¶ 13.

New Press received and accepted the equipment on October 31, 1994. Id. ¶ 12. Further, on October 31, 1994, "DuPont and Tokai entered into a formal written agreement to confirm DuPont's verbal guarantee regarding the . . . [e]quipment." Id. ¶ 13. According to DuPont and Tokai's written agreement, "DuPont agreed that, in the event that New Press defaulted in making payments to Tokai under the [l]ease, DuPont would repurchase from Tokai any equipment that Tokai had purchased on behalf of New Press." Id. ¶ 14. Moreover, DuPont agreed that "Tokai may declare all accelerated sums due under the [l]ease immediately payable from DuPont in the event of a default." Id. ¶ 18.

New Press made only ten monthly payments to Tokai. Id. ¶ 15. Horizon Graphics, Inc. ("Horizon"), New Press' predecessor, failed to make any further payments. Id. Thus, "Horizon defaulted in its obligations under the [l]ease by failing to pay Tokai the monthly charges due for the . . . [e]quipment beginning on or about September 1995." Id. ¶ 16. "On December 11, 1995, Tokai notified DuPont of Horizon's default . . . and . . . demanded that DuPont repurchase the . . . [e]quipment." Id. ¶ 19. DuPont complied with Tokai's demand on September 23, 1996, by remitting payment to Tokai for the purchase of the equipment. Id. ¶ 20.

On October 7, 1997, DuPont filed its complaint in the instant action. In its Complaint, DuPont names the following parties as defendants: (1) New Press; (2) Horizon; (3) Barry Sarenson; and (4) Donna Sarenson.<sup>1</sup> DuPont asserts claims for breach of contract and replevin.

Because DuPont filed its Complaint on October 7, 1997, DuPont was required to serve the summons and complaint on the defendants on or before February 4, 1998. See Fed. R. Civ. P. 4(m) & 6(a). DuPont served Horizon on December 5, 1997. However, DuPont has not yet served the remaining defendants. On May 21, 1998, DuPont filed the instant motion, seeking to extend the time for service of Defendant Barry Sarenson.

## **II. DISCUSSION**

Under Rule 4(m) of the Federal Rules of Civil Procedure:

If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service an appropriate period . . . .

"The determination whether to extend time [under Rule 4(m)] involves a two-step inquiry." Boley v. Kaymark, 123 F.3d 756, 758

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1. The plaintiff alleges that Barry and Donna Sarenson each executed blanket personal guarantees "unconditionally guaranteeing the payments by New Press to Tokai under the [l]ease." Pl's. Compl. ¶¶ 32, 38

(3d Cir. 1997), cert. denied, 118 S. Ct. 1038 (1998) (citing Petrucelli v. Bohringer and Ratzinger, 46 F.3d 1298, 1305 (3d Cir. 1995)). First, the court must decide "whether good cause exists for a plaintiff's failure to effect timely service. If good cause exists, the extension must be granted." Boley, 123 F.3d at 758 (citing Petrucelli, 46 F.3d at 1305). Second, "[i]f good cause does not exist, the district court must consider whether to grant a discretionary extension of time." Boley, 123 F.3d at 758 (citing MCI Telecomms. Corp. v. Teleconcepts, Inc., 71 F.3d 1086, 1098 (3d Cir. 1995), cert. denied, 117 S. Ct. 64 (1996)).

#### **A. Good Cause**

In MCI Telecomms. Corp., the United States Court of Appeals for the Third Circuit defined "good cause" as follows:

We have equated "good cause" with the concept of "excusable neglect" of Federal Rule of Civil Procedure 6(b)(2), which requires "a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the time specified in the rules." See Petrucelli, 46 F.3d at 1312 (Becker, J., concurring in part and dissenting in part). . . . [T]he primary focus is on the plaintiff's reasons for not complying with the time limit in the first place.

71 F.3d at 1097.

In the instant action, DuPont argues that it made a good faith effort to effect service on Defendant Barry Sarenson. On October 8, 1997, DuPont mailed Defendant Barry Sarenson a waiver of

service of summons and a notice of lawsuit, but it was returned "unclaimed." Pl.'s Mem. of Law at 1. On November 20, 1997, DuPont attempted to personally serve this defendant at his last known address, without success. Id. at 2.

On December 18, 1997, Thomas G. Guiney ("Guiney") telephoned DuPont's counsel in this matter, Mark S. Stewart, Esq. ("Stewart"). Stewart Aff. ¶ 2. Guiney, an attorney in Massachusetts, explained that he: (1) anticipated representing all of the defendants in this matter; (2) was too busy to respond to the complaint until the holidays; and (3) expected to retain Mel Shuster ("Shuster") as local counsel in Philadelphia. Id. Moreover, Guiney informed Stewart that New Press "was defunct; and that the equipment at issue was located with" Horizon. Id.

During this call, Stewart asked Guiney to accept service on behalf of the remaining defendants. Id. ¶ 4. Guiney stated that because he had not been retained, he could not agree to Stewart's proposal. Id. However, Guiney agreed to contact Stewart after the holidays. Id.

On January 6, 1998, Stewart called Guiney, but Guiney "said that he had not yet had an opportunity to meet with the defendants and that he had still not been retained." Id. ¶ 5. On January 27, 1998, Stewart again spoke with Guiney, who stated that he had not yet met with the defendants. Id. ¶ 6. Further, Guiney asserted that he would not represent the defendants "if they were

not in a position to pay his fees and those of his local attorney." Id. "In contemplation of Mr. Guiney accepting service for all defendants, and not having knowledge of Mr. Sarenson's address, DuPont did not serve Mr. Sarenson and the time deadline for serving Mr. Sarenson elapsed." Pl.'s Mem of Law at 2.\<sup>2</sup>

This Court finds that the plaintiff has failed to show "good cause" for its delay in serving the complaint and summons on defendant Barry Sarenson. The plaintiff attempted to serve the defendant on only two occasions. Pl.'s Mem. of Law at 1. On October 8, 1997, the plaintiff "mailed, certified return receipt requested, a waiver of service of summons and notice of lawsuit which was returned by the United States Postal Service as 'unclaimed.'" Id. Then, on November 20, 1997, the plaintiff unsuccessfully attempted to personally serve the defendant at his last known address. Id. at 2. After failing on these attempts, the plaintiff did not retry to personally serve the defendant during the remaining seventy-six days preceding the service deadline.

Instead, the plaintiff struggled unsuccessfully to negotiate a waiver of service through Guiney. Although Guiney continued to refuse service on the defendants' behalf, the plaintiff did not attempt to serve the defendants as the service deadline approached. Moreover, the plaintiff did not petition this

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2. On March 2, 1998, Guiney and Shuster entered their appearances for Horizon.

Court for permission to serve the defendants in an alternative manner. See Tsyganskiy v. Beatty, No. CIV.A.97-7249, 1998 WL 88347, \* 1-2 (E.D. Pa. Mar. 2, 1998). Nor did the plaintiff seek an extension prior to the expiration of the service deadline. In fact, the plaintiff waited 106 days after the deadline to request an extension. The plaintiff's "half-hearted" efforts cannot excuse the plaintiff's delay. Petrucelli, 46 F.3d at 1307. Thus, this Court finds that the plaintiff has not offered a valid reason for its delay and has not demonstrated its good faith. See Momah v. Albert Einstein Med. Ctr., 158 F.R.D. 66, 69 (E.D. Pa. 1994) (finding good cause absent "where failure of service was caused by [plaintiff attorney's] lack of diligence, as well as his professional neglect.").

#### **B. Discretionary Extension**

A court may grant an extension "even in the absence of good cause." Boley 123 F.3d at 758; see Fed. R. Civ. P. 4(m) Adv. Comm. Notes (1993) ("Relief may be justified . . . if the defendant is evading service or conceals a defect in an attempted service."). When deciding whether to exercise its discretion, a court may consider the following factors: "(1) [sic] frivolousness [of the plaintiff's complaint]; (ii) [the plaintiff's] motivation [in pursuing its claims]; (iii) objective unreasonableness (both in the factual and the legal components of the case) and (iv) the need in particular circumstances to advance consideration of compensation

and deterrence." Pickens v. Interncommunity Agency, Inc., No. CIV.A.96-8415, 1997 WL 727604, \* 7 (E.D. Pa. Nov. 21, 1997) (citing Lieb v. Topstone Indus., Inc., 788 F.2d 151 (3d Cir. 1986)).

To the extent these factors can be applied, they weigh in favor of granting the plaintiff an extension. First, it appears as though the plaintiff has alleged a viable cause of action. Second, the plaintiff has been motivated while pursuing this case, and, in fact, recently moved for a default judgment against Horizon.\<sup>3</sup> Third, the plaintiff's claims appear both factually and legally reasonable at this stage. Fourth, the plaintiff provides a valid argument to support its request for an extension. The plaintiff contends that because defendant Barry Sarenson accepted service on defendant Horizon's behalf, defendant Barry Sarenson has notice of the lawsuit. Pl.'s Mot. Ex. C.\<sup>4</sup> Accordingly, because these factors weigh in favor of an extension of the time to serve, the Court grants the plaintiff's motion.

An appropriate Order follows.

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3. This Court denied that motion on March 16, 1998. See E.I. DuPont De Numbers and Co. v. The New Press, Inc., No. CIV.A.97-6267, 1998 WL 159050, \* 5 (E.D. Pa. Mar. 16, 1998)

4. Defendant Barry Sarenson signed the Proof of Service form directed to Horizon as Horizon's president.



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	:	
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O R D E R

AND NOW, this 25th day of June, 1998, upon consideration of the Plaintiff's Motion to Extend the Time for Service of Barry Sarenson (Docket No. 22), IT IS HEREBY ORDERED that the plaintiff's Motion is **GRANTED**.

IT IS FURTHER ORDERED that the plaintiff **SHALL** serve defendant Barry Sarenson within twenty (20) days of the date of this Order.

BY THE COURT:

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HERBERT J. HUTTON, J.